95-1726

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE,
ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Sentencing Guidelines and rule:

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-53a) is reported at 70 F.3d 1396. A prior opinion of the court of appeals affirming David E. Piper's conviction is reported at 35 F.3d 611, and a prior opinion affirming respondent Dyer's conviction is reported at 9 F.3d 1. The prior opinions of the court of appeals affirming the convictions of respondents LaBonte and Hunnewell are unreported, but the judgments are

noted at 19 F.3d 1427 (Table) and 10 F.3d 805 (Table), respectively. The order of the district court denying LaBonte's motion for resentencing (App. 54a-66a) is reported at 885 F. Supp. 19. The orders of the district court denying Hunnewell's and Piper's motions for resentencing (App. 71a-72a, 73a-108a) and Dyer's motion under 28 U.S.C. 2255 (App. 67a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1995. A petition for rehearing was denied on January 24, 1996. App. 109a-113a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND SENTENCING GUIDELINE INVOLVED

The following provisions are set forth in an appendix to this petition: 28 U.S.C. 994(h), and Sentencing Guidelines § 4B1.1 (Nov. 1, 1995), with accompanying Commentary.

STATEMENT

Respondents George LaBonte, Alfred Lawrence Hunnewell, and Stephen Dyer, as well as defendant David E. Piper, were convicted of federal controlled substance offenses in the United States District Court for the District of Maine. Before November 1, 1994, each of the four was sentenced as a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1993). The court of appeals affirmed each defendant's conviction and sentence. Subsequently, each defendant filed a motion seeking a reduction in his sentence based on an amendment to the career offender provision of the Sentencing Guidelines promulgated

by the United States Sentencing Commission, effective November 1, 1994. In two of the cases, the district court found that the amendment was contrary to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, and refused to apply it. In the other two cases, another judge of the same district court found that the amendment was valid. The court of appeals consolidated the ensuing appeals. A divided panel of the court of the appeals upheld the amendment, and affirmed in part, reversed in part, and remanded.

1. In 1984, Congress created the United States Sentencing Commission and charged it with the responsibility to promulgate sentencing guidelines for the federal system. See 28 U.S.C. 991; *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). In addition to articulating general goals for federal sentencing that the Commission was directed to meet, see *Neal* v. *United States*, 116 S. Ct. 763, 767 (1996), Congress gave the Commission a variety of specific requirements with which it was to comply. 28 U.S.C. 994(b)-(n). Among those requirements is the following provision, dealing with career offenders convicted of crimes of violence or drug trafficking crimes:

> The [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [(1) has been convicted of a felony that is a crime of violence or a drug trafficking crime, and (2) has two prior felony convictions involving crimes of violence or drug trafficking crimes].

28 U.S.C. 994(h).

The Sentencing Commission implemented Section 994(h) in Section 4B1.1 of the Sentencing Guidelines, entitled "Career Offender," which provides as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

> * If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Before November 1, 1994, the commentary to that Guideline defined the phrasé "offense statutory maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction." Neither the

Guideline itself nor any accompanying commentary specified the manner in which the "offense statutory maximum" was to be determined when federal law specified a basic statutory maximum for all persons convicted of a particular offense, but an enhanced statutory maximum for persons convicted of that offense who also had prior convictions. Such enhanced sentences are a critical component of sentencing for federal narcotics crimes.[1] The courts of appeals that had addressed the question, however, uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum penalty, not the maximum penalty authorized for a defendant with no prior convictions. See *United States* v. *Smith*, 984 F.2d 1084, 1086-1087 (10th Cir.), cert. denied, 114 S. Ct. 204 (1993); *United States* v. *Saunders*, 973 F.2d 1354, 1364 (7th Cir. 1992), cert. denied, 506 U.S. 1070 (1993); *United States* v. *Gar- rett*, 959 F.2d 1005, 1009-1011 (D.C. Cir. 1992); *United States* v. *Amis*, 926 F.2d 328, 330 (3d Cir. 1991); *United States* v. *Sanchez-Lopez*, 879 F.2d 541, 558-560 (9th Cir. 1989).

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[1] For example, 21 U.S.C. 841(b)(1)(C) states that persons convicted of specified controlled substance offenses "shall be sentenced to a term of imprisonment of not more than 20 years." Section 841(b)(1)(C) further provides, however, that, "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years." The enhanced penalties may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1).

By Amendment 506, effective November 1, 1994, the Sentencing Commission amended the commentary to Guidelines § 4B1.1 to define the phrase "offense statutory maximum." The Commission defined that phrase to mean "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." See App. 116a. The Commission asserted that by precluding use of the enhanced statutory maximums, Amendment 506 "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). It also stated that "the enhanced maximum sentences provided for recidivist drug offenders * * * did not exist" at the time that 28 U.S.C. 994(h) was enacted. 59 Fed. Reg. at 23,609. Pursuant to its authority under 28 U.S.C. 994(u), the Commission made Amendment 506 retroactive, so that a sentencing court would have discretion to reduce a sentence imposed before the promulgation of the amendment.[2] See Guidelines § 1B1.10(c) (Nov. 1, 1995).

2. The court of appeals' decision involves consolidated appeals from four cases in which defendants moved for reductions of their sentences based on the amendment. All four defendants had been sentenced

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[2] The Department of Justice opposed the proposed amendment before the Commission, and, following its promulgation, determined that federal prosecutors should oppose the application of the amendment by sentencing courts on the ground that it is invalid as inconsistent with 28 U.S.C. 994(h).

before the effective date of Amendment 506. In each case the district court had utilized the enhanced statutory maximum penalty in calculating the defendant's total offense level under Guidelines § 4B1.1 (Nov. 1, 1993). Each of the defendants subsequently moved for resentencing based on Amendment 506. The government argued that Amendment 506 is invalid as contrary to Section 994(h). In two of the cases, the district court concluded that Amendment 506 is a valid exercise of the Commission's authority; the court reduced one defendant's sentence but declined to reduce that of the other defendant. In the other two cases, the district court determined that Amendment 506 is inconsistent with 28 U.S.C. 994(h) and thus invalid, and it therefore denied the defendants' motions for resentencing.

George LaBonte: After a plea of guilty, respondent LaBonte was convicted on one count of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). At LaBonte's sentencing, the district court found that LaBonte qualified as a career offender. Based on LaBonte's prior drug convictions, the district court determined that his "offense statutory maximum" was more than 25 years' imprisonment and set his offense level at 34. After a three-level reduction for acceptance of responsibility, LaBonte had an offense level of 31 and a sentencing range of 188-235 months' imprisonment. The district court imposed a sentence of 188 months' imprisonment. The court of appeals affirmed. *United States* v. *LaBonte*, 19 F.3d 1427 (1st Cir. 1994) (Table); see App. 7a.

After the effective date of Amendment 506, LaBonte moved for resentencing under 18 U.S.C. 3582(c)(2).[3] The district court found that the amendment is valid and granted LaBonte's motion. See App. 54a-66a. Using the definition of "offense statutory maximum" required by Amendment 506, the court found that LaBonte's total offense level was 32. See *id.* at 7a-8a. The court again deducted three levels for acceptance of responsibility. See *id.* at 8a. Application of Amendment 506 resulted in a sentencing range of 151 to 188 months' imprisonment. *Ibid.*; *id.* at 57a. The district court imposed a sentence of 151 months' imprisonment. *Id.* at 66a.

David E. Piper: After a plea of guilty, Piper was convicted of conspiracy to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846, and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). The district court employed the enhanced statutory maximum and determined that Piper's offense level was 37. The court reduced that level by three based on Piper's acceptance of responsibility and calculated Piper's sentencing range as 262 to 327 months' imprisonment. Piper received a sentence of

[3] That section states that a sentencing "court may not modify a term of imprisonment once it has been imposed except that— * * * (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant * * * the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [of Title 18] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

300 months' imprisonment. The court of appeals affirmed. 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995); see App. 8a.

Piper later sought resentencing under Amendment 506, arguing that, if the unenhanced statutory maximum were used, his sentencing range would be 210 to 262 months' imprisonment. See App. 8a & n.3. The district court assumed that the amendment is valid, but declined to give Piper its benefit. *Id.* at 8a, 102a. The court found that application of the amendment was discretionary, and it concluded that the amendment should not apply in Piper's case because of the seriousness of his offense. *Ibid.*

Alfred Lawrence Hunnewell: After a plea of guilty, Hunnewell was convicted on two counts of possessing controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Hunnewell's offense level at 34, deducted three levels for acceptance of responsibility, and found that Hunnewell's sentencing range was 188 to 235 months' imprisonment. The court sentenced Hunnewell to 188 months' imprisonment. The court of appeals affirmed. 10 F.3d 805 (1st Cir. 1993) (Table), cert. denied, 114 S. Ct. 1616 (1994); see App., *infra*, 8a-9a.

After November 1, 1994, Hunnewell moved for a reduction in sentence. He asserted that application of Amendment 506 to the Guidelines would lower his sentencing range to 151 to 188 months' imprisonment. See App. 9a n.4. The district court found that Amendment 506 is invalid because it is "in contravention of 21 U.S.C. § 841(b)(1)(C) and 28 U.S.C. § 994(h)." *Id.* at 71a. Accordingly, the court denied the motion for resentencing. *Ibid.*

Stephen Dyer: After a plea of guilty, Dyer was convicted of conspiracy to possess controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Dyer's total offense level at 34 and refused to reduce that level based on acceptance of responsibility, resulting in a sentencing range of 262 to 327 months' imprisonment. The court imposed a sentence of 262 months' imprisonment. The court of appeals affirmed. 9 F.3d 1 (1st Cir. 1993) (per curiam); see App. 9a.

After November 1, 1994, Dyer filed a petition under 28 U.S.C. 2255, seeking to have his conviction set aside. App. 9a. In the alternative, Dyer asked to be resentenced based on Amendment 506. *Ibid.* Amendment 506, if applied, would have reduced Dyer's Guidelines sentencing range to 210-262 months' imprisonment. *Id.* at 10a n.5. The district court denied the petition, rejecting Dyer's reliance on Amendment 506 on the basis of its prior decision on Hunnewell's request for resentencing. *Id.* at 70a.

3. The government appealed the district court's order granting LaBonte's motion for resentencing. Piper, Hunnewell, and Dyer appealed the district court orders denying their motions. The court of appeals consolidated the cases, and a divided panel held that Amendment 506 is valid. App. 1a-53a.

The court of appeals first determined that the standard of review articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides "the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute." App. 11a. The court "f[ou]nd no clear congressional directive regarding

the meaning of the term 'maximum' as that term is used in [28 U.S.C.] 994(h)." *Id.* at 19a. It therefore asked whether the Commission's interpretation of the statute was a reasonable one.

The court concluded that it was. The court explained:

> The statute explicitly refers to "categories of defendants," namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests. Unless one is prepared to write off Congress's choice of the word "categories" as some sort of linguistic accident or awkward locution—and we are not so inclined—this approach is eminently supportable.

App. 19a. The court noted that "[t]he root purpose of the Career Offender Guideline, U.S.S.G. § 4B1.1, is to enhance repeat offenders' sentences," *id.* at 23a, and determined that "[t]he revamped guideline not only accomplishes that purpose but also coheres with Congress's discernible aims in making enhanced penalties available under [21 U.S.C.] 841," *id.* at 23a-24a.

The court of appeals then considered the application of Amendment 506 to the four defendants before it. The court affirmed the district court's judgment reducing respondent LaBonte's sentence based on Amendment 506. App. 30a. The court also affirmed the judgment with respect to Piper. *Id.* at 30a-32a. The court rejected Piper's contention that

the district court was required to resentence him in accordance with Amendment 506, explaining that the pertinent statutory provision (18 U.S.C. 3582(c)(2)) "authorize[d] the district judge to resentence when resentencing is consistent with the policies underlying [Amendment 506], but it neither compel[led] the judge to do so nor limit[ed] his inquiry to the consistency question." App. 30a. With respect to respondents Hunnewell and Dyer, the court of appeals set aside the district court's orders denying the motions for resentencing and remanded the cases so as to permit the district court to consider whether the respondents should be resentenced in accordance with Amendment 506. *Id.* at 32a-34a. The court also affirmed the district court's dismissal of Dyer's Section 2255 petition. App. 34a-37a.

Judge Stahl filed an opinion concurring in part and dissenting in part.[4] Judge Stahl concluded that Amendment 506's approach to the implementation of 28 U.S.C. 994(h) was

> inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841. These statutes, to which Congress expressly referred in the text of § 994(h), provide an intricate web of enhanced penalties applicable to defendants who are repeat offenders or whose offenses resulted in death or serious bodily injury. The [Commission's] interpretation, however, completely disregards these enhanced penalties because, under that interpretation, all defendants must be sentenced at or near the unenhanced maximum whether or not the enhanced penalties apply. Recognizing that Congress specifically referred to these statutes in the text of § 994(h), it seems absurd to suppose that Congress did not intend to preclude this result.

App. 40a. Judge Stahl also argued that "the legislative history strongly suggests that Congress intended 'maximum term authorized' [in 28 U.S.C. 994(h)] to refer, in appropriate circumstances, to the enhanced maximum penalty." *Id.* at 42a.

The government filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied rehearing and rehearing en banc, with Judges Stahl and Lynch dissenting. App. 109a-113a. Judge Stahl's dissent noted, *inter alia*, that, "because the amendment applies retroactively, it will undoubtedly burden district courts throughout the country with the task of reviewing on a case by case basis a substantial number of requests for resentencing. Indeed, this is already the case in the First Circuit." *Id.* at 112a. Judge Boudin concurred in the denial of rehearing en banc but expressed the view that "[t]he sooner the Supreme Court has an opportunity to consider whether to review this case, the better for all concerned." *Id.* at 111a.

[4] Judge Stahl concurred in the court of appeals' dismissal of respondent Dyer's Section 2255 petition and dissented from the court's determination that Amendment 506 was valid. See App. 38a.

REASONS FOR GRANTING THE PETITION

The court of appeals has upheld an amendment to the Sentencing Guidelines that, contrary to a specific congressional requirement, provides for a reduced sentencing range for some of the most serious offenders in the federal system. Rather than meeting Congress' direction that such career offenders be

sentenced "at or near" their statutory maximum terms—terms that are enhanced by statute to reflect their status as recidivists—the Commission has authorized a regime in which such defendants are sentenced based on maximum terms that would apply if they were *not* recidivists.

The First Circuit's decision in this case squarely conflicts with decisions of the Seventh and Tenth Circuits. As those courts have recognized, Amendment 506 is inconsistent with the directive of 28 U.S.C. 994(h) that the Sentencing Guidelines shall "specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders, and the Amendment is therefore invalid. The Ninth Circuit has deepened the split by joining the First Circuit in concluding that Amendment 506 is a permissible exercise of the Commission's authority. Review by this Court is warranted to resolve the conflict among the circuits on an issue of widespread importance in federal sentencing.

1. The First Circuit in the instant case was the first court of appeals to address the validity of Amendment 506. Since its decision, unanimous panels of the Seventh and Tenth Circuits have rejected the First Circuit's conclusion and have determined that Amendment 506 conflicts with the Sentencing Reform Act and is invalid. The circuit conflict was recently compounded by the Ninth Circuit's decision upholding Amendment 506.

A. In *United States* v. *Hernandez*, Nos. 95-1143 & 95-1212, 1996 WL 116360 (Mar. 18, 1996), the Seventh Circuit held that Amendment 506 could not be reconciled with 28 U.S.C. 994(h) and is therefore invalid. The court concluded that "to construe [Section 994(h)] as referring to the unenhanced maximum departs from the common sense of the term 'maximum,' rests on a strained reading of the term 'categories,' and relegates the enhanced penalties Congress provided for in [21 U.S.C.] 841 to the dust bin." Slip op. 23, 1996 WL 116360 at *12. The court explained that

> perhaps the most compelling indication that the Commission's interpretation is inconsistent with congressional intent lies in the fact that it virtually nullifies the enhancements called for in [21 U.S.C.] 841. If one uses the unenhanced statutory maximum as the term of incarceration to be referenced for all defendants under the Career Offender Guideline, nearly all sentences will fall at or below that lower maximum term. Thus, absent an extraordinary number of upward adjustments in the offense level or an outright departure from the guideline range, no defendant will be sentenced to a term at or near the enhanced maximum.

Id. at 28, 1996 WL 116360, at *15. In the Seventh Circuit's view, "[w]hen Congress directed the Sentencing Commission to provide for sentences 'at or near the maximum term authorized' for persons who qualify as career offenders, it meant the highest penalty for which a given defendant is eligible." *Id.* at 31, 1996 WL 116360, at *16. The Seventh Circuit acknowledged that its ruling conflicts with the First Circuit's decision in the instant cases but found the

First Circuit's reasoning unpersuasive. See *id.* at 23-26, 1996 WL 116360, at *12-14.[5]

B. The Tenth Circuit reached the same conclusion in *United States* v. *Novey*, No. 95-6249 (Mar. 15, 1996) (to be reported at 78 F.3d 1483). The court found itself "compelled by the clear directive of § 994(h) to hold that Amendment 506 is inconsistent with that statute, and is therefore invalid as beyond the scope of the Commission's authority delegated to it by Congress." Slip op. 7. In the court's view, "[i]t would make no sense for the statute to require the 'maximum term authorized' to be considered in the context of defendants with two or more prior qualifying felony convictions unless it was intended that that phrase mean the enhanced sentence resulting from such a pattern of recidivism." *Id.* at 9. Like the Seventh Circuit, the Tenth Circuit recognized that its holding conflicts with the decision of the First Circuit in the instant cases but disagreed with the First Circuit's reasoning. *Id.* at 12-18. Rather, the court agreed with Judge Stahl's dissenting view that "the Commission's current interpretation of the statute is 'inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841.'" *Id.* at 10 (quoting App. 40a).

C. In *United States* v. *Dunn*, No. 95-30172, 1996 WL 162434 (Apr. 9, 1996), a divided panel of the Ninth Circuit upheld Amendment 506 as consistent with 28

[5] Because its decision conflicted with that of the First Circuit, the Seventh Circuit opinion was circulated among all active circuit judges pursuant to Seventh Circuit Rule 40(e). Only Judges Easterbrook and Ripple voted in favor of rehearing en banc. Slip op. 2 n.**, 1996 WL 116360, at *19.

U.S.C. 994(h). The court relied in substantial measure on the decision in the instant cases, explaining that it found the opinion of the First Circuit majority to be more persuasive than the views expressed by Judge Stahl in dissent. 1996 WL 162434, at *2. Judge Rymer dissented "for the reasons stated by Judge Stahl in his dissenting opinion in" the instant cases. *Id.* at *3.

2. Review by this Court is warranted to resolve the square conflict among the circuits. The question presented is pending in several other courts of appeals and in dozens of district courts. The ultimate resolution of the issue will have a significant effect on the periods of incarceration for the country's most serious drug offenders. And in light of the careful and detailed exposition of the competing positions in the majority and dissenting opinions of the First, Seventh, Ninth, and Tenth Circuits, the issue is ripe for consideration by this Court.

3. As the Seventh and Tenth Circuits have recognized, Amendment 506 cannot be reconciled with the Commission's statutory obligation to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders. 28 U.S.C. 994(h). Section 994(h)'s reference to "the maximum term authorized" clearly refers to the actual statutory maximum for the defendants subject to its provisions — *i.e.*, the enhanced maximum for defendants with prior convictions for the specified felonies—rather than to the maximum penalty applicable to hypothetical defendants who have no previous convictions. Congress's evident intention in enacting Section 994(h) was to ensure that whatever provision the Commission made in the Guidelines for defendants

who did not have prior criminal records at the time they committed a drug trafficking crime, defendants who *did* have two prior convictions for the specified crimes would be sentenced at or near the top of the enhanced imprisonment ranges that Congress had provided for such repeat offenders. Under Amendment 506, however, defendants who are required by virtue of their recidivist status to be sentenced "at or near" the statutory maximum will be sentenced "at or near" a maximum calculated as if they were not recidivists. As the Seventh Circuit recognized, that approach "virtually nullifies the enhancements called for by [21 U.S.C.] 841" by establishing a regime under which, "absent an extraordinary number of upward adjustments in the offense level or an outright departure from the guideline range, no defendant will be sentenced to a term at or near the enhanced maximum." *Hernandez*, slip op. 28, 1996 WL 116360, at *15.

4. The Commission's stated justifications for Amendment 506 do not withstand analysis. The Commission explained that, in its view, the amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). Neither of those justifications is persuasive.

The Commission's allusion to "unwarranted double counting" is enigmatic. The reference may reflect the Commission's view that it is unfair for prior convictions to be used both to trigger the statutory enhancement and to increase the defendant's total offense level under the Career Offender Guideline. See *Hernandez*, slip op. 32, 1996 WL 116360, at *17

("The notion that use of the enhanced maximum amounts to double counting * * * stems from the fact that the defendant's prior convictions trigger both the statutory enhancement and the Career Offender Guideline."). Alternatively, the perceived "double counting" may be the use of the defendant's prior convictions both in determining the total offense level and in computing the criminal history category. See *Novey*, slip op. 6, 1996 WL 115326, at *2 ("Under [the government's] interpretation [of Guidelines § 4B1.1], a defendant's prior convictions are, in effect, used twice: first to enhance the defendant's criminal history category and again to enhance the defendant's offense level.").[6]

Neither of the possible "double counting" objections has merit. As to the first objection: Section 994(h)'s directive that the Guidelines sentencing range for a career offender must be "at or near" the statutory maximum necessarily requires that increases in the statutory maximum will be translated by some mechanism into increases in the applicable sentencing range. Calling that mechanism "double counting" does not undercut the fact that it is simply

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[6] Even under Amendment 506, however, that form of "double counting" would still be present, albeit to a reduced extent. Guidelines § 4B1.1 provides that in determining the guideline range for a career offender, "[i]f the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply." See page 4, *supra*. Because the table becomes applicable only if a defendant is a career offender (*i.e.*, only if he has at least two prior felony convictions of the specified type), the Guideline thus expressly uses a defendant's prior convictions in increasing his offense level, as well as in determining his criminal history category.

a way to elevate the sentencing range in order to achieve compliance with the statutory mandate. As to the second: while use of prior convictions in computing both the offense level and the criminal history category might be objectionable if the sentence ultimately arrived at appeared inconsistent with congressional intent, here the reverse is true.

Nor does using the enhanced statutory maximum give undue effect to prosecutorial discretion. Pursuant to 21 U.S.C. 851(a)(1), the enhanced statutory maximum penalties apply only if the government has given the defendant pretrial notice of the prior convictions on which the government intends to rely. See note 1, *supra*. Thus, as a practical matter, federal prosecutors have discretion to determine (by filing or declining to file the requisite notice) whether an enhanced statutory maximum term of imprisonment will apply. Insofar as Amendment 506 might be said to prevent "disparity associated with variations in the exercise of prosecutorial discretion," it does so by effectively precluding the government from invoking the enhanced statutory maxima at all. That rationale for Amendment 506 is clearly inconsistent with the statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1996